

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

Affidavit

77-3041

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -x
IN RE, UNITED STATES OF AMERICA, :

Petitioner, :

----- -x
SOCIALIST WORKERS PARTY, et al., :

Plaintiffs-Appellees, :

- v - :

THE ATTORNEY GENERAL, et al., :

Defendants-Appellants. :

----- -x

DOCKET NOS.

77-3041
77-8271

ON MANDAMUS AND APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

PETITION OF THE UNITED STATES OF
AMERICA FOR REHEARING AND SUGGESTION
OF REHEARING EN BANC



ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

THOMAS E. MOSELEY
STUART I. PARKER
FRANK H. WOHL
Assistant United States Attorneys

- Of Counsel -

TABLE OF CONTENTS

	<u>PAGE</u>
Reason For The Petition	2
Statement of Facts	4
<u>ARGUMENT:</u>	
I. THE DISTRICT COURT'S FAILURE TO MAKE A DETERMINATION WITH RESPECT TO EACH INFORMANT SHOULD BE REVIEWED BY THIS COURT	6
II. THE DISTRICT COURT'S ORDER RAISES AN IMPORTANT ISSUE WHICH SHOULD NOT GO UNREVIEWED	11
CONCLUSION	16

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Allegaert v. Perot</u> Dkt No. 77-7263, (2d Cir. Nov. 7, 1977)	12
<u>Black v. Sheraton Corp. of America</u> Dkt No. 75-2034, (D.C. Cir. Aug. 22, 1977)	8,9
<u>Clavir v. Levi</u> Civil Action No. 76-1071 (S.D.N.Y.)	2
<u>Gillespie v. United States</u> 379 U.S. 149 (1969)	11
<u>Halperin v. Department of State</u> Dkt No. 76-1528 (D.C. Cir. Aug. 16, 1977)	10
<u>Herbert v. Lando</u> Dkt No. 77-7140 (2d Cir. Nov. 7, 1977)	12
<u>Investment Properties International, Ltd. v. IOS, Ltd.</u> 459 F.2d 705 (2d Cir. 1972)	7
<u>Irwin v. Gavit</u> 268 U.S. 161 (1925)	9
<u>Jabara v. Kelley</u> Civil Action No. 39065 (E.D. Mich. June 9, 1977)	13

	<u>Page</u>
<u>Kenyatta v. Kelley</u> 375 F.Supp. 1175 (E.D. Pa. 1974)	13
<u>Kerr v. United States District Court</u> 426 U.S. 394 (1976)	7,8
<u>McSurely v. McClellan</u> 521 F.2d 1024 (D.C. Cir. 1975)	11
<u>Metros v. United States District Court</u> 441 F.2d 313 (10th Cir. 1971)	3,11,12
<u>National Lawyer's Guild v. Attorney General</u> Civil Action No. 77-0999 (S.D.N.Y.)	2
<u>Rural Housing Alliance v. United States Department of Agriculture</u> 502 F.2d 1179 (D.C. Cir. 1974)	15
<u>Shattuck v. Hoegl</u> 523 F.2d 509 (2d Cir. 1975)	10, 11
<u>Socialist Workers Party v. Attorney General</u> Dkt No. 77-3041, (2d Cir. Oct. 11, 1977)	1,3,4,5, 10, 11
<u>United States v. Anderson</u> 509 F.2d 724 (9th Cir. 1975), <u>cert. denied</u> , 402 U.S. 910 (1975)	13,14
<u>United States v. Hemphill</u> 369 F.2d 539 (4th Cir. 1966)	12
<u>United States v. Nixon</u> 418 U.S. 683 (1974)	11,13,15
<u>United States v. Reynolds</u> 345 U.S. 1 (1953)	12,13
<u>United States v. Schiavo</u> 504 F.2d 1 (3d Cir. 1974), <u>cert. denied</u> , 419 U.S. 1096 (1974)	11
<u>Usery v. Ritter</u> 547 F.2d 528 (10th Cir. 1977)	10
<u>Johnny Weimerskirch</u> 67 T.C. 672 (1977)	10,14
<u>Will v. United States</u> 389 U.S. 90 (1967)	7

TEM:as
11-3786

STATUTES

United States Code

Page

28 U.S.C. § 1291 4, 11

TEM:lnd
73-2365
11-3786

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PETITION OF THE UNITED STATES OF
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OF REHEARING EN BANC

Pursuant to Rules 40 and 35(b) of the Federal Rules of Appellate Procedure, the Government hereby petitions for rehearing and suggests the appropriateness of rehearing en banc with respect to the October 11, 1977 decision by a panel of this Court.* The panel's decision held that the District Court's order, which directed the Government to turn over to plaintiffs' attorneys the Federal

* The panel's decision, Socialist Workers Party v. Attorney General, Dkt. No. 77-3041, slip op. 6223 (2d Cir., Oct. 11, 1977) will be referred to hereinafter as the "Opinion."

TEM:as
73-2360
11-3786

Bureau of Investigation ("FBI") files and summaries concerning 18 informants, was not subject to appellate review.*

Reasons for the Petition

The decision of the panel, by appearing to legitimize the procedure followed by the District Court, threatens an adverse and far-reaching impact on the information gathering activities of law enforcement agencies utilizing informants. The order now before the Court calls for release to plaintiffs' counsel of eighteen informant files and will possibly be followed by an order directing release of the identities of another 1300 informants, which plaintiffs' counsel has also demanded. If the panel's opinion stands, release of privileged materials to opposing counsel is likely to become the routine first step in litigating questions of informant privilege and other governmental privileges in criminal and Freedom of Information Act cases, as well as in several other pending cases involving issues similar to those in the present litigation. See, e.g., National Lawyers Guild v. Attorney General, Civ. No. 77-0999 (S.D.N.Y.) (Brieant, J.) and Clavir v. Levi, Civ. No. 76-1071 (S.D.N.Y. (Owen, J.).

These circumstances require guidance from this Court on the proper procedure for adjudicating claims of governmental privilege. This Court's consideration of this

* A full statement of the factual background of this case is found at pages 3-30 of the Government's original petition and brief (the "Petition").

TEM:as
73-2360
11-3786

question should precede, rather than follow, revelation of the eighteen files because, as the panel observed, "the identification of informants once made, will be irreversible on an appeal from the final judgment," Opinion at 6231.

Mandamus is particularly appropriate here because the District Court, as the record now makes clear, has completely failed to exercise its judicial responsibility. By asserting that revelation of files to plaintiffs' counsel does not constitute a breach of the informant privilege, the District Court seeks to justify turning over the files to opposing counsel without first making any individual determinations of which files should be turned over and which should not. Rather, the District Court expects plaintiffs' counsel to make that determination and then return the files for which they have no use. To release privileged files without first making such individual determination as to each informant is clearly a manifest abuse of discretion.

Finally, these serious issues of public policy make this case an extremely inappropriate vehicle in which to announce, as the panel did, this Circuit's departure from other circuits' views concerning appellate review of informant privilege questions. See, e.g., Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971).

TEM:as
73-2360
11-3786

Statement of Facts

Although the panel concluded that the District Court's order was not subject to review by mandamus and was not appealable under 28 U.S.C. § 1291, its decision expressed concern "that the course upon which the district judge had embarked will lead to disclosure for which there is no substantial need . . . and to unnecessary rummaging in government files." Opinion at 6230. The decision suggested that the District Court defer deciding whether to permit plaintiffs' attorneys to review the summaries and files "until more fundamental issues, perhaps dispositive of the need, are decided on trial." Opinion at 6232.*

Following the panel's decision, the District Judge reconsidered his order but declined to modify it. At a conference held on November 3, 1977, the District Judge gave his reasons for not following the panel's suggestions and also rejected a detailed proposal (86-91aa)** from the

* To the extent that the District Court's refusal to follow the recommendations of this Court constitutes an abuse of discretion not subject to the original petition for mandamus, the Government respectfully requests that the instant application be considered as a second petition for mandamus on that point.

** References are to pages of the Supplemental Appendix submitted by the Government on motion dated November 16, 1977.

TEM:as

73-2360

11-3786 Government for implementing those suggestions.*

The District Judge stated as a general proposition that the informant files which he had examined revealed potentially tortious conduct by informants and that unless plaintiffs' attorneys examined the files they would not be able to prepare for trial or address the Government's defenses to liability. The District Judge said:

It is my faith that the plaintiffs will learn a great deal from the review of those files and that after they have reviewed them we will be able to get together and we will be able to discuss, I believe -- this is practically for the first time -- this intelligently with both the plaintiffs and the defendants participating exactly what claims can be legitimately made for damages, what cannot be, how to handle the statute of limitations problems, the question of whether a preliminary trial on that issue might be useful at that point, and a lot of other questions which really are being held in abeyance now because the plaintiffs don't have the evidence (52aa).

The District Judge also denied a request by Government counsel for an informant by informant determination of which of the 18 files contain indications of possibly tortious conduct. In denying this request, the District Judge indicated that even four years after the commencement of this

* In summary, the Government proposed, as the panel had suggested, Opinion at 6231, that prior to the release of any files several purely legal questions bearing on plaintiffs' need for disclosure of informant materials first be resolved followed by a trial on the remaining factual questions triable without disclosure of privileged material, including plaintiffs' need for privileged material (86-91aa). For a discussion of the issues to be decided prior to disclosure of the informant files, see Petition at 54-92.

TEM:as
73-2360
11-3786

litigation, plaintiffs' claims remain so amorphous that he cannot tell which files will be useful to plaintiffs' counsel and which will not, and that, in his view, no individualized determinations are necessary because disclosure of the informant files to plaintiffs' counsel does not constitute a breach of the privilege:

"... I felt that I did not have sufficient knowledge to make the decision as to what would be important to their [plaintiffs'] case or not so important to their case, and I further felt that regardless of the views -- I'm sure again this was obviously disagreed with -- but I felt there wasn't the slightest breach of the ultimate confidentiality of having these files looked at on a private basis by the plaintiffs' attorneys. I still don't think so. I don't think there is any breach whatsoever (58-59aa).*

ARGUMENT

POINT I

THE DISTRICT COURT'S FAILURE TO MAKE A DETERMINATION WITH RESPECT TO EACH INFORMANT SHOULD BE REVIEWED BY THIS COURT

In this case a district judge will not decide an important claim of governmental privilege unless directed to do so by this Court. Instead, the District Judge has simply ordered disclosure of 18 informant files to plaintiffs' counsel even though, as is now apparent, he has not

* The District Court did offer to summarize the Government's summaries for the Court of Appeals and also indicated that it was possible to point out what he "tentatively regard[ed] as the potential claims that plaintiffs may assert" (60aa). The District Court, however, remained steadfast in its conclusion that no individualized determination was necessary prior to turning the informant files over to plaintiffs' counsel (60-61aa).

TEM:as
73-2360
11-3786

even made a determination that each file contains information which requires such disclosure. Moreover, despite the clear concern expressed by the panel, the District Court has failed to recognize the serious inroads upon the informant privilege inherent in its procedure (50aa, 58-59aa, 62aa).

The writ of mandamus, as this Court recognized in Investment Properties International Ltd. v. IOS, Inc., 459 F.2d 705, 707 (2d Cir. 1972) is properly employed to compel a district judge "to exercise its authority when it is his duty to do so." Will v. United States, 389 U.S. 90, 96 (1967). As the present record makes clear that basic proposition on the availability of mandamus applies with particular force to this case. While it is an obvious duty of a district judge to rule on serious claims of privilege, the court below has not only refused to decide the Government's claim after in camera review, it has also failed to make an in camera determination whether each informant file "individually should or should not be disclosed" to plaintiffs' counsel.* See Kerr v. United States District Court, 426 U.S. 394, 404 (1976).

* As discussed in Point II, infra the question of whether such disclosure to opposing counsel would be justified under any circumstances is at best one of first impression and, contrary to the panel's decision, is not "well-established."

TEM:as
73-2360
11-3786

Before embarking upon a course which threatens the public interest behind the informant privilege, the District Judge, at the very least, should have made an in camera determination as to each informant. See Kerr, supra, at 404-405. Had such a threshold determination been made those informants whose files and summaries have no relevance to plaintiffs' claims would have been protected from the significant risks the panel recognized that disclosure to the plaintiffs' attorneys entails.

A recent decision by the Court of Appeals for the District of Columbia, Black v. Sheraton Corp. of America, Dkt. No. 75-2039, slip op. 1, 26 (D.C. Cir. Aug. 22, 1977), elucidates the proper procedure. In Black, a suit against the United States arising out of the FBI's electronic surveillance of the plaintiff, the district court had refused to decide a claim of governmental privilege upon in camera review, insisting instead that any such review be conducted with plaintiff's counsel present. After the Government rejected this procedure, the district court imposed sanctions under Rule 37 and found for plaintiff at trial. In reversing, the Black court held that all other methods of procedure had to be found unworkable before a district court could consider having opposing counsel participate, even to a limited degree, in the in camera consideration of privileged materials.

TEM:as
73-2360
11-3786

Black makes abundantly clear that the point has hardly been reached in this litigation at which even limited access to the informant files by plaintiffs' counsel can be considered. First, no determination has been made whether each file contains information which might outweigh the informant privilege. Second, as to each file which might contain such information, the District Court has made no specific decision that it is impossible to resolve the question of privilege without participation by plaintiffs' counsel and that such participation cannot be had without revelation of the informant's identity to counsel. See Black, supra, at 26.

There is no justification for such an abdication of judicial responsibility.* Admittedly, the District Court would be required to make certain decisions, but a court should not be "troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law". Irwin v. Gavit, 268 U.S. 161, 168 (1925) (Holmes, J.). The effect of the District Court's failure to make an individualized determination is the same as if he had never undertaken any in camera review himself,

* The District Court has expressed his confidence that if plaintiffs reviewed the files and found nothing of interest they would say "these files are of no use to us and thank you, take them back (62aa)." "

TEM:as
73-2360
11-3786

and, instead, had simply ordered disclosure to plaintiffs' attorneys when the issue was first raised.* Cf. Halperin v. Department of State, Dkt. No. 7 28, slip. op. 1, 13-16 (D.C. Cir. Aug. 16, 1977).

When it is recognized that disclosure, once made, even to counsel of high character and integrity, will certainly be irreversible and may very well lead to further inadvertent disclosures,** the District Court's order rises to a level which calls for appellate review for "review of a disclosure order may be proper where denial of such review would effectively preclude any review at all of an individual's claim." Shattuck v. Hoegl, 523 F.2d 509, 513 (2d Cir. 1975). See also Usery v. Ritter, 547 F.2d 528, (10th Cir.

* Since plaintiffs' counsel have denied any special competence for reviewing these files, Petition at 92-3, the putative need for any such insight can hardly serve as justification for the District Court's order. See, Johnny Weimerskirch, 67 T.C. 672, 678 n.4 (1977). While plaintiffs' counsel, as zealous advocates, might prove more inventive in constructing causes of action from the informant files the need for such zeal, arguably present in every case, hardly seems a valid basis for compromising privileged information. Moreover the District Court's reasoned assessment of conduct revealed in the files, rather than counsel's ingenious constructions or subjective views on its "importance," ought to be balanced against the public interest in confidentiality.

** See Opinion at 6231; Petition at 49-52.

TEM:as 1977); Metros v. United States District Court, 441 F.2d 313
73-2360
11-3786 (10th Cir. 1971).*

POINT II

THE DISTRICT COURT'S ORDER RAISES AN IMPORTANT ISSUE WHICH SHOULD NOT GO UNREVIEWED

The panel found itself powerless to grant appellate review because of what it believed to be a "well-established" rule authorizing a district judge to "permit opposing counsel to participate in and assist him in the conduct of in camera proceeding under pledge of secrecy." Opinion at 6230. An examination of the authorities relied on for this rule reveals that, at best, they are inapposite. Moreover, the District Court's action, when measured against pertinent authority, stands out as wholly unprecedented and so improper as to be replete with grave dangers for the sound administration of justice.

In short, the District Court's order raises just the kind of question which is "too important to be denied review." Shattuck v. Hoegl, 523 F.2d 509, 513 (2d Cir. 1975).** Indeed, the order calls into question whether this

* Review under 28 U.S.C. § 1291 would also seem appropriate since the test of finality is practical rather than technical and the District Court's order is certainly final as to both the Government's and the informants' claims to confidentiality. See Gillespie v. United States, 379 U.S. 149, 152 (1969); McSurely v. McClellan, 521 F.2d 1024, 1031 (D.C. Cir. 1975) United States v. Schiavo, 504 F.2d 1, 5 (3d Cir. 1974), cert. denied, 419 U.S. 1096 (1974).

** This importance is punctuated by the fact that failure to take jurisdiction will require the Government to choose between harm to the public interest from disclosure and the risk of sanctions including contempt. See United States v. Nixon, 418 U.S. 683 (1974).

TEM:as
73-2360
11-3786

Court, despite the panel's view, does maintain a policy against review which is more stringent than that adopted by other circuits. See, e.g., Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971); United States v. Hemphill, 369 F.2d 539 (4th Cir. 1966). In addition, given the vital public interest at issue here, appellate review should not depend upon the vagaries of certification, particularly where the issue posed by this discovery order is no more intrinsically difficult, and certainly no less important, than those reviewed under 28 U.S.C. § 1292(b). See, e.g., Herbert v. Lando, Dkt. No. 77-7142, slip op. 221, (2d Cir. Nov. 7, 1977). On the other hand, appellate review here would hardly cause a flood of new appellate matters. Compare Allegaert v. Perot, Dkt. No. 77-7263, slip op. 295, 296 (2d Cir., Nov. 7, 1977).

Over twenty years ago the Supreme Court, in United States v. Reynolds, 345 U.S. 1, 8 (1953), made clear that the procedures for adjudicating a claim of governmental privilege should not force "a disclosure of the very thing the privilege is designed to protect." As the opinion of the Court of Appeals in Reynolds stated, the examination of privileged material by the Court "must obviously be ex parte and in camera if the privilege is not to be lost in its

TEM:as
73-2360
11-3786

assertion." 192 F.2d 987, 997 (3d Cir. 1951).^{*} Thus in Kenyatta v. Kelley, 375 F. Supp. 1175, 1176 (E.D. Pa. 1974), an action involving claims of privilege over FBI investigative files similar to that asserted here, the District Court held:

The only appropriate method for considering the defendants' claim of privilege was by an ex parte in camera examination of the facts underlying that assertion.

See also Jabara v. Kelley, Civil Action No. 39065 (E.D. Mich. June 9, 1977) for a recent reaffirmation of the Reynolds holding.

Neither the observation in a footnote to United States v. Nixon, 418 U.S. 683, 715 n. 21 (1974), nor the dicta in United States v. Anderson, 509 F.2d 724, 729 (9th Cir. 1975), cert. denied, 420 U.S. 910 (1975) alters the Reynolds rule. At most the footnote in Nixon authorized disclosure of information among officials of the executive branch. In other words, the procedure sanctioned in Nixon, unlike that ordered in the present case, did not contemplate any disclosure outside Government of material over which a governmental privilege was asserted.

* The opinion of the Court of Appeals in Reynolds was reversed by the Supreme Court because the Court of Appeals had held that the privileged material must always be disclosed to the District Court for its review. That reversal, however, leaves the validity of the quoted statement unchanged.

TEM:as
73-2360
11-3786

In Anderson, a criminal case where the the bases of the informants' information supplying probable cause was at issue, an in camera hearing on this point with defense counsel excluded was sustained on appeal. In dicta, that Court suggests that where probable cause is at issue, defense counsel's participation in in camera proceedings might be permissible.* Moreover the Anderson** dicta is hardly authority for a rule in civil litigation since in criminal cases the Government would be left with the option of dropping the prosecution rather than compromising an informant's identity through such an in camera proceeding.

Should the District Court's procedure be accepted as well-established then its application will almost assuredly be sought in other civil and criminal matters in this

* The purpose of such participation would be for defense counsel to cross examine witnesses whose testimony, if given in open court, might lead to the disclosure of informants' identities. See 509 F.2d at 729. Here, unlike Anderson, no such purpose would be served by opposing counsel's participation. In addition, the Anderson procedure would not in most instances, directly reveal the informant's identity since presumably only the defendant, not his counsel, would be able to identify the informant by use of details disclosed in the law enforcement agent's in camera testimony

** Our research has found no other case which puts the Anderson dicta in practice, either in criminal or in civil litigation. Its only other reported reference in civil litigation is Johnny Weimerskirch, 67 T.C. 672, 678 n.4 (1977), a tax refund suit which declined to allow opposing counsel's participation in the in camera examination of informant materials, with a passing reference to Anderson.

TEM:as
73-2360
11-3786

and other circuits.* Indeed, this procedure could radically change the treatment of informant questions in criminal matters where the privilege is admittedly weaker and the interests of the proponent of disclosure are certainly greater than plaintiffs' interests in prosecuting damage claims that are speculative at best.

Acceptance of this procedure also entails a result inconsistent with the separation of powers. Governmental privileges are grounded, at least in part, in the need to protect the functioning of Government through the safeguarding of certain information. See United States v. Nixon, 418 U.S. 683, 711 (1974). Yet the District Court's order confers upon private counsel, responsible to private clients and not the public, an equal right to such protected information. In the future, district courts will thus be put in the undesirable position of according all private attorneys access to such information, since they are officers of the Court, or else making judgments, either express or implied, about counsel's commitment and capacity to protect information.**

* Application to Freedom of Information Act litigation could also be expected. Cf. Rural Housing Alliance v. United States Department of Agriculture, 502 F.2d 1179 (D.C. Cir. 1974), which deletes from a prior opinion the suggestion that opposing counsel might participate in in camera inspection of withheld documents.

** It is not unforeseeable that counsel who are denied access to materials in camera will want the basis for such denial made explicit, possibly even for the purpose of seeking appellate review. Given the increasing volume of cases with issues similar to those in the present litigation, it is likely that this will be a recurring problem.

TEM:as
73-2360
11-3786

CONCLUSION

For all of the above reasons, the United States of America respectfully requests that this Court grant its petition for reargument.

Dated: New York, New York
November 16, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

THOMAS E. MOSELEY
STUART I. PARKER
FRANK H. WOHL
Assistant United States Attorneys

- Of Counsel -

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Thomas E. Moseley being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
16th day of November 19 77 he served/~~any~~ of the
within Petition of the United States of America for Rehearing and
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17th day of November, 1977

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 RALPH L. LEE

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No. 41-229283 Queens County
Term Expires March 30, 1979